Supreme Court, U.S.
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No. 01-380

In The
Supreme Court
of the
United States

LYNN ANN KIM,
Petitioner,
vs.
PACIFIC BELL, a Corporation,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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I.

THIS PETITION PRESENTS A JUSTICIABLE QUESTION

Respondent asserts that this Court should deny the Petition because it presents a non-justiciable question. Respondent bases this contention on the theory that even assuming a contract statute of limitations applies to Petitioner's ERISA section 510 claim, her claim is still untimely because the district court found Petitioner's employment contract was oral, and oral contracts in California are governed by a two-year limitations period. Respondent is mistaken because its argument is based on a false premise.

Petitioner's section 510 claim is not based on her employment contract. Rather, Petitioner's section 510 claim is based on respondent's alleged interference with her ERISA-protected rights to service retirement credits under the company's Pension Plan, which the district court affirmed is a written document. (Pet. App. 12b-13b.)

The District Court acknowledged that if the correct statute of limitations is four years, Petitioner's claim would be timely, but ultimately found that the one-year statute of limitations for wrongful termination set forth in California's Code of Civil Procedure section 340, subdivision (3) applied. (Pet. App. 13b.) This ruling was appealed to the Ninth Circuit and affirmed. (Pet.App. 2a-3a.) Significantly, while respondent argued in both the district court and the appellate court that an ERISA section 510 claim was more analogous to a wrongful termination action than to a contract action, it never argued, as it does here, that if a contract limitations period applied, it would be the two year limitations period for oral contracts rather than the four year statute for written contracts.

Therefore, Petitioner's contention that her section 510 claim is subject to a four-year statute of limitations was raised and preserved in both the district court and in the Court of Appeal. Conversely, Respondent's claim that if a contract limitations period applies, it is the two year period for oral contracts rather than the four year period for written contracts, was never raised anywhere prior to

its Brief in Opposition in this Court. Accordingly, the issue is properly before this Court.

II.

THE EXISTING CONFLICT BETWEEN THE CIRCUITS JUSTIFIES REVIEW BY THIS COURT

Respondent attempts to minimize the importance of the issue presented here by characterizing the split among the circuits as not a "serious conflict" worthy of this Court's consideration. Again, respondent is mistaken. *Heideman v. PFL, Inc.* (8th Cir. 1990) 904 F.2d 1262, *cert. denied* 498 U.S. 1026, 111 S.Ct. 676, 112 L.Ed.2d 668 (1991), holding that Tennessee's six year statute of limitations for contract actions applies to ERISA section 510 claims, has not been overruled and is still good law. Moreover, several courts have recognized that the circuits have reached "disparate conclusions" and a "lack of consensus" as to this issue, possibly because section 510 recognizes and provides remedies for several different types of rights, which, individually, may be analogous to more than one state statute. (See *Sandberg v. KPMG Peat Marwick, LLP* (2nd Cir. 1997) 111 F.3d 331, 334, *Teumer v. General Motors Corp.* (7th Cir. 1994) 34 F.3d 542, 544-546 and cases cited therein.)

As is set forth fully in the Petition, when considering ERISA section 510 claims, the circuits have variously applied state statutes of limitations for wrongful termination, retaliatory discharge, employment discrimination, contract actions and violations of statutory rights. Accordingly, review by this Court is necessary and appropriate to settle this important question and to ensure uniformity of decision.

Respectfully submitted,

DATED: October 10, 2001

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